

BUSINESS MEETING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Special Business Meeting)
)
_____)

CALIFORNIA ENERGY COMMISSION
HEARING ROOM A
1516 NINTH STREET
SACRAMENTO, CALIFORNIA

MONDAY, AUGUST 2, 2004

2:10 P.M.

Reported by:
Peter Petty
Contract No. 150-04-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMISSIONERS PRESENT

William J. Keese, Chairman

Arthur Rosenfeld

James D. Boyd (via teleconference)

John L. Geesman

Jackalyne Pfannenstiel

STAFF and CONSULTANTS PRESENT

Robert Therkelsen, Executive Director

William Chamberlain, Chief Counsel

Song Her, Secretariat

Gary Fay, Hearing Officer

Caryn Holmes, Staff Counsel

PUBLIC ADVISER

Margret Kim

ALSO PRESENT

Babak Naficy, Attorney
Law Offices of Babak Naficy
representing intervenor Coastal Alliance on Plant
Expansion

Christopher T. Ellison, Attorney
Ellison, Schneider and Harris, LLP
representing applicant Duke Energy

Randall J. Hickok, Vice President
Duke Energy, North America, LLC

Robert Schultz, City Attorney
City of Morro Bay

ALSO PRESENT

Tom Luster, Environmental Specialist
California Coastal Commission

V. John White
Sierra Club

John McKinsey
El Segundo Power Project, LLC

David Nelson

Jack McCurdy

Bill Brand (via teleconference)

Shoosh Crotzer (via teleconference)

Tarrin Collins (via teleconference)

Robert Sarvey (via teleconference)

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P R O C E E D I N G S

2:10 p.m.

CHAIRMAN KEESE: We'll call this meeting of the Energy Commission to order. Commissioner Boyd is joining us by phone.

COMMISSIONER BOYD: I'm here, Commissioner Keese.

CHAIRMAN KEESE: Thank you. We will do the Pledge.

(Whereupon the Pledge of Allegiance was recited in unison.)

CHAIRMAN KEESE: Good morning, everyone. Today the Morro Bay Committee, consisting of Commissioner Boyd and myself, offers the latest edition of its proposed decision on the Morro Bay application for certification.

This decision contains the Committee's rationale for determining that the proposed Morro Bay Power Plant project will, if constructed and operated under the conditions set forth in the decision, comply with all applicable laws, ordinances, regulations and standards; and that the project will not result in any significant adverse, unmitigated environmental impact.

Therefore the decision concludes the

1 project should receive a certificate from the
2 Energy Commission.

3 The proposed project is based
4 exclusively upon the record established during
5 this proceeding which we have independently
6 evaluated. The decision provides references to
7 the record supporting all of our findings and
8 conclusions.

9 The Morro Bay project is a major
10 modernization of the existing Morro Bay Power
11 Plant. The applicant, Duke Energy Morro Bay, LLC,
12 proposes to remove the existing 50-year-old
13 facility and replace it with a new modern combined
14 cycle power plant with a generating capacity,
15 including duct firing, of 1200 megawatts.

16 The proposed project will have a number
17 of environmental benefits relative to the existing
18 plant. For example, the two new combined cycle
19 units will have stacks which are significantly
20 lower than those on the existing plant. This
21 feature, along with relocation of the power plant
22 to the site of the existing tank farm north of the
23 old plant, will reduce visual impacts for a great
24 number of viewers.

25 In addition, to control air emissions,

1 the project will employ best available control
2 technology, we know as BACT, and air emissions
3 will be fully offset in accordance with applicable
4 law.

5 One of the most controversial areas of
6 this case has been the potential impacts to the
7 marine environment in the Morro Bay Estuary from
8 the project's once-through cooling water system.

9 After a careful analysis of the evidence
10 we have determined that the proposed project will
11 have less impact on the aquatic environment than
12 the existing power plant.

13 Thus, under the California
14 Environmental Quality Act, CEQA, the proposed
15 project will have no significant adverse impact on
16 the aquatic environment. Nevertheless, by our
17 conservative analysis, we have determined that the
18 project will cause some mortality of susceptible
19 aquatic species. To lessen the impacts of the
20 existing plant, such an adverse effect must still
21 be addressed under the provisions of the federal
22 Clean Water Act, which requires the use of best
23 technology available to avoid impacts without
24 comparison to existing facilities.

25 Several of the parties proposed the use

1 of dry cooling to reduce aquatic impacts, and the
2 Committee heard extensive evidence on this topic.
3 However, based on the evidentiary record we have
4 determined that dry cooling is not feasible for
5 the project at the proposed site.

6 The evidence established that, in
7 addition to several other features which rendered
8 dry cooling infeasible, the cost of dry cooling at
9 this particular site is far too high and cannot be
10 justified when compared to the preferred option, a
11 habitat enhancement program known as the HEP.

12 Unlike the dry cooling option a HEP will
13 more broadly address some of the most serious
14 environmental problems in the Morro Bay Estuary.
15 We have reviewed an extensive body of evidence on
16 this subject. Both the applicant and the staff of
17 the Regional Water Board presented HEP approaches
18 that can comply with all legal requirements, and
19 that would offer substantial environmental
20 benefits to the Morro Bay Estuary.

21 The record is clear that even without
22 operation of the existing or the proposed new
23 power plant, the Morro Bay Estuary is on a path of
24 rapid decline largely due to sedimentation. The
25 HEP contained in the proposed decision offers the

1 most promising opportunities available to slow
2 sedimentation and help preserve the estuarine
3 environment of Morro Bay.

4 Another controversial issue was the
5 appropriate role of the Coastal Commission in
6 Energy Commission AFC proceedings for which there
7 was no preceding NOI process. In several versions
8 of the Presiding Member's Proposed Decision the
9 Committee grappled with this matter. Ultimately
10 we concluded that under section 25523(b) of the
11 Warren Alquist Act the Coastal Commission's timely
12 recommendations on a project made under section
13 30413(d) of the Coastal Act would be binding on
14 the Energy Commission unless we find that the
15 recommendations would be feasible or would cause a
16 greater adverse environmental impact.

17 The proposed decision that you will
18 consider today thus incorporates all of the
19 Coastal Commission recommendations except for a
20 few on which the Committee has made the requisite
21 findings of infeasibility or greater adverse
22 impact.

23 The proposed decision also recommends
24 that the logistics of Coastal Commission
25 participation in future Energy Commission

1 proceedings be established through the development
2 of an MOU between the two agencies. And we have
3 directed our staff to begin the process of
4 developing such an agreement as soon as possible.
5 I understand a meeting is imminent.

6 As I previously noted the proposed
7 decision determines that the Morro Bay project
8 will comply with all applicable laws, ordinances,
9 regulations and standards. The Coastal Commission
10 continues to believe that the project does not
11 comply with portions of the Coastal Act, or with
12 portions of the City of Morro Bay's local coastal
13 program.

14 Projects that do not comply with
15 applicable state or local law cannot be certified
16 unless the Energy Commission makes override
17 findings under Public Resources Code section
18 25525.

19 Therefore, assuming hypothetically that
20 the Coastal Commission is correct, while formally
21 concluding otherwise, we have made override
22 findings concerning those two laws.

23 The Commission began its review of this
24 project in October of 2000. Since that time the
25 Commission Staff conducted more than a dozen

1 different public workshops and issued numerous
2 analyses of the project. While the Committee
3 issued 25 orders or rulings, held well more than a
4 dozen hearings and conferences of its own, and
5 issued five versions of or errata to the proposed
6 decision.

7 Many intervenors and representatives of
8 numerous state, regional and local agencies
9 actively participated in the proceedings, and have
10 made valuable contributions to the record. The
11 Committee thanks all the participants for their
12 efforts.

13 Now, the Committee believes that the
14 time has come for the Commission to issue a
15 favorable decision on the AFC, and certify the
16 Morro Bay project.

17 Before I close my remarks I have to
18 mention an important procedural consideration.
19 The Committee recommends to the Commission that
20 the Commission adopt the decision today, but not
21 docket it until after the Regional Water Board has
22 issued the NPDES permit for the project.

23 Adoption of the decision today will
24 provide an approved document to other agencies,
25 such as the Water Board and the City of Morro Bay,

1 as soon as possible.

2 Delaying of docketing will mean that the
3 clock for judicial review of our decision will not
4 start ticking until after the Regional Board has
5 acted, which will help to implement the
6 Legislature's goal that judicial review of all
7 challenges to power plants be consolidated in one
8 proceeding in the Supreme Court.

9 If we docket the decision immediately
10 then judicial review of our decision and the
11 Regional Board's decision would probably be
12 independent and uncoordinated, and could take much
13 longer than consolidated review.

14 Before we begin consideration of the
15 Morro Bay decision, we must address a petition to
16 reopen the record sent to the parties by CAPE, via
17 email, and filed in the docket unit on the
18 afternoon of July 27, 2004.

19 We will first hear from CAPE on its
20 petition; and then give the other parties time to
21 briefly respond. Each party's remarks are limited
22 to two minutes, and I'd like to start with CAPE.

23 MR. NAFICY: Good afternoon; I'm Babak
24 Naficy, counsel for CAPE. I appreciate the
25 opportunity to address you on this issue.

1 We believe that the facts essentially
2 speak for themselves. The time to speculate about
3 whether units 1 and 2 at Morro Bay are ever going
4 to operate again has come to an end. And we think
5 that the fact that at the peak of the energy
6 demand these units remained closed, and the
7 operation of the plant at a very minimal level
8 make it highly unlikely that the plant will ever
9 be operated -- the existing plant will ever
10 operate at levels nearly as intensely as they were
11 in 2000, in 1999 or 2001.

12 Therefore we believe that it's important
13 for the CEC to take a close look at the existing
14 plant, the actual, on-the-ground existing plant
15 that is in operation.

16 Contrary to the claim that Duke has made
17 in their opposition obviously this issue is
18 extremely important to having a fair and objective
19 assessment of what the existing plant is, and to
20 the conclusion that this Committee is
21 recommending, that there are no adverse
22 environmental impacts on the aquatic environment.

23 We also believe strongly that if you
24 take a look at the existing plant and the fact
25 that it has been operating the last I know of at

1 about 5 percent capacity shows that a lot of the
2 assumptions that supported the Committee's
3 conclusion that dry cooling is infeasible are
4 simply not valid anymore.

5 The constructability issues, the money,
6 the costs associated with dismantling the existing
7 plant, some of the safety issues that were raised
8 before, these will simply all have to be
9 reassessed in light of the reality of the existing
10 plant.

11 There really is no authority in CEQA
12 that says you do not have the discretion, and I
13 would argue indeed the responsibility, to take a
14 look at the existing plant before you approve this
15 project. And to claim otherwise, there's simply
16 no support for it in CEQA.

17 The regulation cited by Duke, itself, on
18 its face suggests that there are circumstances
19 under which the baseline should be assessed at a
20 time different than when the environmental
21 assessment began. And this is exactly one such
22 case where the baseline has changed so
23 dramatically, and it will remain in this very low
24 capacity for the foreseeable future as the staff
25 predicted in their FSA. And as you know, Duke

1 dismissed it at the time, and the PMPD actually
2 went with Duke on this one and said, well, it's
3 not likely that the plant will shut down in five
4 years. We believe that, as Duke says, it will
5 operate at 59 percent capacity. And history has
6 proven the staff right and Duke wrong.

7 Thank you.

8 CHAIRMAN KEESE: Please.

9 MR. ELLISON: We oppose the motion. We
10 filed a written response opposing the motion
11 Friday. Hopefully you've had a chance to receive
12 that, if not review it.

13 We opposed it for the following reasons:
14 First of all, it's not timely; it doesn't have any
15 information that suggests this motion could not
16 have been made as much as a year ago. To make the
17 motion at the very last minute before this hearing
18 is simply not timely.

19 Secondly, I want to emphasize that the
20 removal from dispatch of units 1 and 2 is purely
21 temporary. And, in fact, Mr. Hickok's testimony
22 before this Commission in the aging plant
23 proceeding that is quoted in CAPE's motion, goes
24 to great lengths to distinguish retirement of the
25 plant from the temporary removal from dispatch

1 that has occurred here. And Duke is spending
2 considerably money, as outlined in that testimony,
3 to insure that the plant can be brought back
4 online quickly as the energy markets evolve.

5 Thirdly, it is contrary to CEQA to
6 reopen the baseline after you've essentially
7 completed the environmental analysis, and we cite
8 a decision in our pleading that makes that clear.
9 And the argument there is quite simple. If every
10 time conditions change you go back to square one
11 and re-do your baseline and re-do your
12 environmental analysis, you're in do-loop that
13 never ends. And that's certainly the case here.

14 Fourthly, I want to emphasize that
15 subsequent to the baseline adopted by the
16 Committee the plant has operated both
17 significantly more, and now at this moment
18 significantly less, than the baseline. We argued
19 that the significantly greater operation than the
20 baseline should be considered by the Committee.
21 And the Committee rejected that, arguing precisely
22 what we are arguing here, that the baseline is set
23 pursuant to CEQA at the time the environmental
24 review commences, and that it does not change with
25 changes in conditions after that.

1 Finally, we oppose the motion for the
2 reason that it will not change any of the
3 mitigation that the Committee has ordered. As
4 Chairman Keese described, although the Committee
5 concludes there are no significant impacts under
6 CEQA, it has nonetheless ordered mitigation
7 against a zero baseline under the Clean Water Act.
8 And therefore, even if you reopen this proceeding,
9 took new evidence, changed the baseline, the
10 mitigation would remain the same.

11 Thank you.

12 CHAIRMAN KEESE: Thank you. Staff.

13 MS. HOLMES: Thank you, Caryn Holmes,
14 Staff Counsel. I'd like to start by saying that I
15 had hoped to not introduce any new argument, but
16 simply refer back to places in the record where
17 staff has already addressed the issues that have
18 been raised, as a way of shortening our
19 presentation.

20 Staff did extensively address questions
21 having to do with establishment of the baseline
22 earlier in the proceeding. We did not
23 specifically address the question of whether or
24 not the baseline should be changed during the
25 course of a proceeding.

1 We note, as we did in our briefs on
2 baseline having to do with water use, that lead
3 agencies do have broad discretion to select a
4 baseline, provided it's a rational decision and
5 it's based on actual existing conditions.

6 Furthermore, in a case that did address
7 a similar issue, the El Segundo case, staff took
8 the position that once the existing air permits
9 had expired and the plant could not legally
10 operate, that at that point it was appropriate to
11 consider the baseline for water use for that
12 facility to be zero.

13 That, however, is not the factual
14 situation in this case. And in this case we
15 would simply note that the Commission has broad
16 discretion to establish a baseline and not make a
17 specific recommendation.

18 We would, however, ask that when the
19 Committee decides this issue that it explicitly
20 address CAPE's concerns about baseline in writing.

21 Thank you.

22 CHAIRMAN KEESE: Thank you. City of
23 Morro Bay.

24 MR. SCHULTZ: Good afternoon, Robert
25 Schultz, City Attorney for City of Morro Bay.

1 The City opposes the petition to reopen
2 and requests that you deny the request based on
3 the statements made by Duke Energy.

4 CHAIRMAN KEESE: Thank you. Appreciate
5 the expedited presentation.

6 The Coastal Commission.

7 MR. LUSTER: No comments on this issue.

8 CHAIRMAN KEESE: We have no comment on
9 this.

10 Patti Dunton. Ms. Dunton.

11 We have heard from all the parties now
12 regarding the CAPE petition. I'd say it's the
13 Committee's position that CEQA guidelines set the
14 baseline. The Committee's choice of a five-year
15 average for pumping during the years '96 to 2000
16 was a conservative selection, more restrictive
17 than Duke asked.

18 The point that Mr. Ellison made, that
19 anytime new evidence is introduced you would start
20 your proceeding over is a relevant point, also.

21 And I guess my third point would be that
22 we did adopt a zero baseline for the mitigation
23 benefits here and reopening this would be
24 worthwhile.

25 With that, I would ask the question if

1 there's any motion on the petition to reopen the
2 record? Hearing none, that petition is rejected.

3 For everybody's benefit, and I would
4 imagine most people have already noted, there is a
5 Chairman's errata of basically two items, the
6 elimination of a few words, and that elimination
7 of two findings, which in our final review make
8 the document consistent. These were on the front
9 table, and everybody should be able to have a
10 copy.

11 All right, I think that's all the
12 procedural matters we have before we get started.
13 So, Mr. Fay, next step? We have the item before
14 us.

15 MR. FAY: Yes, sir, I think we might
16 just want to briefly summarize the Chairman's
17 errata, and then perhaps begin receiving
18 statements from the various parties.

19 CHAIRMAN KEESE: All right. The
20 Chairman's errata, on page 50, we have, as I said,
21 made a paragraph consistent with earlier and other
22 provisions in our decision.

23 Basically we say contrary to the
24 comments of CAPE we have not ignored or dismissed
25 the specific recommendations of the Coastal

1 Commission. To the contrary, we have incorporated
2 every Coastal Commission recommendation which is
3 feasible and will not cause greater harm to the
4 environment.

5 We have deleted references that we had
6 deleted other places about the evidentiary record.
7 We have also deleted findings 33 and 34 on
8 substantial evidence.

9 Applicant.

10 MR. ELLISON: Thank you, Mr. Chairman.
11 I understand that we have ten minutes for both our
12 affirmative presentation and rebuttal. And with
13 that understanding --

14 CHAIRMAN KEESE: That's, you know, we're
15 not going to be ironclad on this, but that's what
16 we would like to stick to.

17 MR. ELLISON: With that in mind I'm
18 going to be very brief and try to reserve some
19 time for possible rebuttal.

20 Duke's bottomline position before you is
21 that we recommend that the Commission adopt the
22 third revised Presiding Member's Proposed Decision
23 without the latest amendments. We concur with the
24 comments of El Segundo that the latest amendments
25 are not appropriately reflective of existing law.

1 But having said that, our bottom
2 bottomline position is that we want you to decide
3 this case today and adopt any version of the PMPD.
4 The case has gone on too long, as it is. And at
5 this point we would prefer to see you make a
6 decision regardless of what that decision might
7 be.

8 In response to the comments that have
9 been submitted by other parties, given the ten-
10 minute rule, we thought it best to put our point-
11 by-point response in writing, and we have done
12 that. Filed late Friday. Again, I hope you have
13 had the chance to look at that. We're certainly
14 available to answer any questions or concerns that
15 you might have regarding any of those comments.

16 I will simply say that with respect to
17 the Coastal Commission's Staff comments, we
18 believe that many of the concerns that are
19 expressed there misunderstand the proposed
20 decision; and we've outlined that in detail. Many
21 of the alleged infirmities in the proposed
22 decision raised by the Coastal Commission attack
23 arguments that the proposed decision, in fact,
24 does not rely upon for its decision.

25 With respect to the El Segundo's

1 comments, we essentially agree with El Segundo.

2 But, again, we need a decision today.

3 So, with that, let me just say that Duke
4 very much wants to thank the Committee and the
5 Hearing Officer for their very hard work on this
6 case. You sat through very lengthy, very
7 technical and very numerous hearings and workshops
8 involving, with respect to the marine issues,
9 certainly some of the best experts in marine
10 biology in the world. The Moss Landing Marine
11 Laboratory, the California Academy of Sciences,
12 renowned fisheries biologist from LSU and many
13 others.

14 You've read literally thousands of pages
15 of briefs and detailed testimony on these and
16 other issues. And it is very evident to Duke that
17 the Committee and the Hearing Officer have worked
18 extremely hard on this case. We want you to know
19 that we appreciate it.

20 We also recognize that you've been
21 criticized by many people who were not present at
22 the hearings and have not reviewed the evidence
23 certainly to the extent that you have, and we
24 appreciate your perseverance.

25 With respect to that obviously Duke is

1 pleased that the Committee's careful consideration
2 of the evidence has led it to conclude that this
3 project is in the public interest, essentially as
4 originally proposed by Duke. That not only
5 vindicates Duke's position, but it also vindicates
6 the more than year-long public process that we
7 went through with the City to substantially modify
8 the original proposal to address local concerns
9 prior to the case ever having been filed with the
10 Commission.

11 But having said that, there really are
12 no winners here. This case, having taken three
13 years and nine months, well beyond the statutory
14 limit, has certainly caused serious disruption for
15 this project. Hopefully it can still go forward.
16 Duke is still committed to it. But the time for a
17 decision is certainly, in our view, today.

18 Nothing that you have heard or will hear
19 in the arguments for delay, in our view, has
20 merit. I would simply remind you that delay
21 begets delay. The more you delay, the more there
22 are arguments for further delay, based on changing
23 conditions and that sort of thing.

24 So, with that, we again want to thank
25 the Commission and all the parties that have been

1 involved in this long and difficult process. And
2 we ask that the Commission decide this case today.

3 Thank you.

4 CHAIRMAN KEESE: Thank you, Mr. Ellison.
5 Staff.

6 MS. HOLMES: Thank you. I want to start
7 with the observation that this weekend when I was
8 getting ready for this hearing I counted the
9 number of legal filings that we've made since the
10 close of hearings. And that number is 15. Given
11 that it's a pretty high number it's not too
12 surprising that we've addressed virtually all of
13 the issues that the parties have raised in their
14 comments on the most recent version of the
15 proposed decision.

16 Therefore, since we did not file written
17 comments what I'd like to do at this point is
18 rather than save time for rebuttal or for closing
19 argument, I'd like to simply very briefly go
20 through the points one by one, and state what
21 staff's position is, and reference where we have
22 addressed it in previous filings.

23 First, with respect to the comments that
24 were made by Mr. McKinsey of El Segundo Power,
25 staff has addressed the issue of the appropriate

1 role of the Coastal Commission in this proceeding
2 a number of times, including in several briefs
3 that we filed in February of this year and in oral
4 arguments that we filed -- excuse me, in oral
5 argument that we made at a hearing in March.

6 In each instance in which we've made
7 comments our position has been that the provisions
8 of 25523(b) of the Public Resources Code do apply
9 to the role of the Coastal Commission in this
10 proceeding. And therefore we support the
11 conclusions of the amendments to the third revised
12 proposed -- I knew I was going to do that -- third
13 PMPD and urge its adoption.

14 I'd like to move on now --

15 CHAIRMAN KEESE: Which version did you
16 support?

17 MS. HOLMES: The amendments to the third
18 revised PMPD.

19 CHAIRMAN KEESE: Okay, thank you.

20 MS. HOLMES: I think I got that right.

21 CHAIRMAN KEESE: I think you did; I
22 think I didn't.

23 MS. HOLMES: I'd like to move now to the
24 comments of the California Coastal Commission.
25 They filed comments on the 27th of last month.

1 The first point that they make is that
2 the Coastal Commission stated that the Energy
3 Commission, or the Committee perhaps, improperly
4 dismissed their recommendations for reasons other
5 than infeasibility or greater environmental harm,
6 which they state are the only two reasons allowed
7 by statute.

8 As I stated previously, the Energy
9 Commission Staff provided extensive comment on the
10 role of the Coastal Commission in this proceeding.
11 And we are in agreement with the Coastal
12 Commission that the Energy Commission should not
13 be casting judgment on the adjudicative process
14 that occurs at the Coastal Commission.

15 We think that the Energy Commission's
16 job is to determine whether the provisions that
17 they have recommended and brought forward to the
18 Commission in a report are infeasible or would
19 cause greater environmental harm.

20 To use the Energy Commission's forum for
21 an assessment of the sufficiency of the Coastal
22 Commission process, we believe, would encourage
23 forum shopping and administrative inefficiency.
24 And we believe that it's more appropriate for the
25 Commission to focus its analysis on the matters

1 specified in Public Resources Code 25523(b).

2 Secondly, the Coastal Commission raised
3 a couple of issues on infeasibility. First, they
4 claim that the Energy Commission has
5 misinterpreted legal infeasibility by not
6 identifying the modification of endangered species
7 habitat as take under the Endangered Species Act.

8 I have to say that I am somewhat in
9 agreement with Mr. Ellison, I believe, on this
10 point, in that I'm not sure that I read that into
11 the decision that's before you today. Staff does
12 agree with the Coastal Commission that there is
13 substantial evidence in the record, including the
14 comments of all of the resources agencies, that
15 the habitat identified by staff is entitled to
16 protection and should be compensated for.

17 And therefore, we would agree with the
18 Coastal Commission that it is not legally
19 infeasible to require compensation for this
20 habitat. This is an issue that we addressed in
21 our opening briefs that were filed in -- our
22 opening brief that was filed in August -- excuse
23 me, in June of 2002.

24 The second issue having to do with
25 feasibility has to do with the way that the

1 Committee has used this term in evaluating project
2 objectives. The Coastal Commission states that
3 the Energy Commission improperly concluded that
4 staff's alternative cooling proposal was not
5 within the reasonable range of alternatives
6 because it didn't meet the applicant's objectives
7 for duct firing capacity.

8 Staff does agree with the Coastal
9 Commission that accepting the precise duct firing
10 objective of the applicant could be too narrow a
11 reading of CEQA. We filed comments, both in our
12 group four briefs in 2002, and on the PMPD, and on
13 the revised PMPD expressing grave concern about
14 this issue.

15 We are particularly concerned that the
16 Energy Commission avoid arbitrary definitions of
17 project objectives that result in an unreasonably
18 narrow range of alternatives.

19 The third issue raised by the Coastal
20 Commission has to do with the fact that the
21 Committee failed, in the Coastal Commission's
22 estimation, to find a significant effect on
23 aquatic species, because doing so would require
24 speculation that maximum water use might coincide
25 with peak spawning periods.

1 Staff agrees with the Coastal Commission
2 on this position. We note that in its discussion
3 of alternatives the Committee rejected staff's dry
4 cooling alternative because it failed to provide
5 sufficient peaking capacity.

6 We believe that this discussion bolsters
7 our conclusion that it's not unreasonable or pure
8 speculation to assume that the project will use
9 this capacity when evaluating the impacts to
10 aquatic species associated with that use.

11 I'd like to take a little step sideways
12 here and address a point that was raised by Duke
13 in their response to the Coastal Commission's
14 letter. Duke addressed the question of the
15 baseline water use, in other words in order to
16 determine impacts to species you have to first
17 assume what the historical water use is, and then
18 you have to assess how much of a change there's
19 going to be. If there's a difference you have to
20 assess whether or not it's significant.

21 Staff expressed concern in a number of
22 filings including its group four briefs in the
23 summer of 2002, and on the proposed decision and
24 on the revised proposed decision that it's very
25 important that the Committee use actual historical

1 water use and not pumping capacity as a baseline.
2 And we believe that when you do that and you use
3 reasonable assumptions about future plant use,
4 then a conclusion is reached that there could be
5 some significant short-term impacts.

6 The fourth item that was raised by the
7 Coastal Commission is that the project, the
8 Committee ignores the project's nonconformity with
9 state water quality regulations. To be frank, we
10 didn't quite understand the point that the Coastal
11 Commission was making.

12 To the extent that what the Coastal
13 Commission is saying is that Duke has recently
14 resubmitted its application to the Regional Board,
15 we are aware of that fact. We know that there --
16 I believe everybody knows that there have been
17 changes recently adopted by EPA that are
18 applicable to permits for existing cooling water
19 intake structures.

20 It's our understanding that Duke may
21 have submitted the same habitat proposal to the
22 Regional Board that was evaluate din this
23 proceeding. However, we are also aware, based on
24 conversations with the Regional Board, that the
25 interpretation and implementation of the new rule

1 is proving challenging. The Regional Board has
2 asked for some additional information and we think
3 it's possible that the permit adopted by the
4 Regional Board eventually may look considerably
5 different from the draft permit that was received
6 into evidence in this proceeding.

7 Fifth, the Coastal Commission objects to
8 the Committee's, what they refer to as
9 misinterpretation of the phrase cumulative impacts
10 in rejecting staff's conclusion that evaluating
11 cumulative impacts requires looking at all project
12 effects and existing stressors. Staff agrees with
13 the Coastal Commission that the way that we use
14 the term in the proceeding is the correct way and
15 is supported by the CEQA guidelines. We addressed
16 this in briefs filed in the summer of 2002, in
17 comments on the PMPD in 2003, in comments on the
18 revised PMPD in 2004.

19 The last point raised by the Coastal
20 Commission is that they believe that an override
21 pursuant to Public Resources Code 25525 should not
22 be available where the Commission has concluded
23 that the project has conformity. Staff has not
24 addressed this specific issue. We did state on a
25 related issue that it was not clear whether or not

1 the Commission would need to do an override
2 pursuant to 25525 where the Commission concluded
3 that the project was not in conformity with the
4 Coastal Act. So that is a new issue for us.

5 Lastly, I had not planned to respond to
6 the comments of Duke, since they appear to be
7 mostly directed towards comments of other parties
8 rather than the PMPD. But there is one issue I do
9 want to take at least one minute to address.

10 Duke correctly points out that this case
11 has been inhouse since December 2000. And that's
12 a really long time. It's self evident that there
13 have been delays. However, Duke incorrectly
14 states that the primary cause of the delay is
15 staff's conclusion that alternative cooling is
16 feasible and should be used by this project.

17 I don't want to spend a lot of time here
18 arguing about who did what to whom, but I do want
19 everyone to understand that the staff has been
20 diligently pursuing this case. We have met every
21 single filing deadline that has been set. In
22 addition, there is only one instance in which we
23 asked for a delay in the schedule due to our own
24 scheduling problems. That had to do with the
25 unavailability of a witness and it resulted in a

1 hearing being delayed for two weeks.

2 This has been a complicated case with
3 difficult issues. At this time we recommend that
4 the Commission not spend time debating about where
5 to cast blame, but to focus on finishing the case
6 and adopting a sound and defensible decision.

7 CHAIRMAN KEESE: Thank you, Ms. Holmes.
8 I will make two comments. Number one, to
9 alleviate anybody's concern, the Committee Members
10 have read every document that's been filed in this
11 case more than once, as have most of the
12 Commissioners up here. So I think you can rely
13 that we have had input.

14 And on your final point, the Committee
15 and the Commission, itself, accepts some of the
16 responsibility for the delay in this case. But,
17 you know, if this was a dictatorship we'd be able
18 to make decisions instantaneously. We are a
19 democracy of five up here, and we attempt to
20 reconcile conflicts out there. And this case has
21 presented some conflicts in the law that were not
22 easily reconciled. We struggled with them; we
23 hope we've arrived at a conclusion today to go
24 forward.

25 The City of Morro Bay, Mr. Schultz.

1 MR. SCHULTZ: Good afternoon, Rob
2 Schultz, City Attorney for the City of Morro Bay.
3 I intend to be very brief.

4 As the Committee knows, I've been part
5 of this project since its inception, which in the
6 beginning was a project to build a new single, 500
7 megawatt plant and leave the current plant in its
8 place.

9 During the four-plus years of reviewing
10 this project I've had to wear many hats, legal
11 counsel, negotiator, facilitator, and I've even
12 had to testify as a witness. As an attorney that
13 was an eye-opening experience.

14 I've seen the project manager for both
15 the CEC and Duke change four times on this
16 project, which has been difficult for negotiations
17 and for other issues.

18 As Chairman Keese stated, the City of
19 Morro Bay has conducted and hosted countless
20 public hearings, workshops and evidentiary
21 hearings to analyze this project and its
22 implications on the environment.

23 The City has spent over \$1 million
24 reviewing this project and negotiating an
25 agreement to lease with Duke. The agreement to

1 lease was a result of lengthy negotiations between
2 the City and Duke that began in 1999 with the
3 submittal of applicant's first AFC.

4 The agreement to lease includes complex
5 agreements between Duke and the City that provide
6 for long-term benefits and revenues.

7 Unfortunately, the City has been in a holding
8 pattern because it cannot approve the agreement to
9 lease until the CEC issues its final decision.

10 Through the CEC process the City of
11 Morro Bay has had a substantial positive role in
12 influencing the shape of this project for the
13 benefit of the community. Although the City does
14 disagree with some of the findings and some of the
15 conclusions in the third revised PMPD and the
16 amendments, it is supportive of you adopting it
17 and moving forward. We take the position the same
18 as Duke, that regardless if it's the PMPD or any
19 other amendments, that you at least make a
20 decision today so we can move forward.

21 It is the City's position that the
22 project, as set forth, will provide tremendous
23 value to the City and the environment. Based upon
24 the various public hearings and workshops, both
25 the City Council and the Planning Commission for

1 the City of Morro Bay issued resolutions stating
2 the City's opposition to alternative cooling
3 methods for the proposed Morro Bay Power Plant.

4 City resolution 5701 opposed methods
5 that would cause adverse effects on visual, noise,
6 air quality, socioeconomics and other local
7 resources compared to the proposed project.

8 Planning Commission resolution 0101
9 found that dry cooling could cause an unsightly
10 and unnecessary visual blight on the community;
11 could cause a potential hardship on the City's
12 water supply; may cause unnecessary noise and use
13 excessive amounts of prime land on the
14 Embarcadero.

15 Finally, resolution 7201 found that the
16 alternative cooling option methods would adversely
17 affect the City's beauty and uniqueness and would
18 cause adverse effects on visual, noise, air
19 quality, health, socioeconomics, hazardous
20 materials, traffic and transportation on other
21 local natural resources compared to the proposed
22 project.

23 The City adamantly opposes the Coastal
24 Commission's request to not adopt the PMPD. The
25 Coastal Commission's arguments in regard to its

1 role in this proceedings and that dry cooling is
2 feasible is not supported by the evidence and law.
3 When I read their arguments, and instead of going
4 into it I really, what I think of, I think of the
5 case called Healing v. Coastal Commission, and
6 that's found at 22Cal.Ap.4.1158 wherein the court
7 stated, and I quote, "We see many virtuoso
8 performances in the theaters of bureaucracy but we
9 confess a sort of perverse admiration for the
10 Coastal Commission's role in this case. It has
11 soared beyond both the ridiculous and sublime and
12 presented a scenario sufficiently extraordinary to
13 relieve us of any obligation to explain why we are
14 reversing. To state the Coastal Commission's
15 position is to demonstrate its absurdity."

16 I think that quote, you can't find any
17 better words to fit what the Coastal Commission
18 has attempted to do for the last year in trying to
19 circumvent your role in this proceedings. And I
20 urge you to not take their recommendation. And
21 approve the PMPD today.

22 The City supports once-through cooling
23 with Duke's proposed HEP, as it is the alternative
24 that is most protective of the Morro Bay Estuary.

25 In conclusion, based on four years of

1 review and the lengthy evidentiary record, it is
2 clear that the modernization of the Morro Bay
3 Power Plant will greatly benefit the environment
4 and it would be in the public's best interest.

5 The significant impacts caused by
6 alternative cooling options are not acceptable to
7 the City. And the City would rather live with the
8 existing power plant than with a new power plant
9 with dry or hybrid cooling. The City urges you to
10 adopt the PMPD without any further delays.

11 Thank you for your time.

12 CHAIRMAN KEESE: Thank you. Mr. Luster,
13 Coastal Commission.

14 MR. LUSTER: Thank you, Mr. Chair,
15 Commissioners. I'm Tom Luster with the California
16 Coastal Commission. I just have a few brief
17 comments today on the third revised PMPD as
18 recently amended.

19 First off, we acknowledge and appreciate
20 your acknowledgement of the Coastal Commission's
21 role in the AFC review. We've provided more
22 detailed written comments on our position
23 previously, so I won't go into that right now.

24 Also, regarding the timing of our
25 involvement in your review, we are going to be

1 meeting with your staff relatively quickly and
2 hopefully clarify this issue. So this won't be
3 coming up on each and every AFC review in the
4 future.

5 CHAIRMAN KEESE: Thank you.

6 MR. LUSTER: We submitted some written
7 comments last week. I have a slightly revised
8 version of that letter that I'll provide to you
9 today. Our main comments are the same. This is
10 primarily a change in some of the citations that
11 hopefully will clarify our comments a bit more
12 than last week's letter did.

13 CHAIRMAN KEESE: And we'll see that's
14 docketed, also.

15 MR. LUSTER: Thank you. I'll just very
16 briefly cover the main concerns that we raised in
17 this letter. Ms. Holmes provided a pretty good
18 summary of our position. I just want to cover
19 very briefly our position.

20 First main concern that the Committee
21 rejected some of the Coastal Commission's
22 provisions in a manner not provided by statute.

23 Second concern, by rejecting some of
24 those provisions, the Committee improperly applied
25 the otherwise allowable consideration of

1 infeasibility. On that point there is a comment
2 earlier about the terrestrial habitat and the
3 impacts there not requiring mitigation.

4 I want to point out that in our 30413(d)
5 report the Coastal Commission did identify much of
6 the coastal dune habitat, although degraded, it is
7 considered escha, either by the City in its LCP,
8 or by the Coastal Commission. And so by default
9 that is habitat that would require mitigation in
10 the Coastal Commission's view.

11 Our third main concern, by
12 mischaracterizing an impact as speculative, the
13 Committee improperly dismisses in part the
14 feasibility of dry cooling and the related Coastal
15 Commission provision.

16 Fourth, the proposed decision does not
17 adequately address the project's nonconformity to
18 state water quality requirements.

19 Fifth, the proposed decision is based in
20 part on a misinterpretation of CEQA's definition
21 of cumulative impacts which result in inadequate
22 recognition of a substantial impact to marine
23 biology caused by the proposed project.

24 Sixth and final main concern, the
25 proposed decision improperly uses the override

1 provision in section 25523(d) of the Warren
2 Alquist Act to override a finding of conformity
3 rather than a finding of nonconformity.

4 With that I'll close with a summary
5 comment. The concerns we expressed in this letter
6 are fairly detailed and focus on interpretation of
7 statutes and statutory definitions. These add up,
8 however, to an overriding concern about the Energy
9 Commission's potential approval of a modernized
10 power plant that will unnecessarily cause
11 unmitigated and significant environmental impacts.

12 In closing, I'd be happy to answer any
13 of your questions now or later in the hearing.
14 Thank you.

15 CHAIRMAN KEESE: Thank you, Mr. Luster.
16 Let me just -- why don't you stay there for a
17 second.

18 MR. LUSTER: Okay.

19 CHAIRMAN KEESE: Ms. Dunton, I assume,
20 is not here at this time?

21 Do any of the members have questions of
22 any of them at this --

23 Thank you, Mr. Luster.

24 We have a request for a number of people
25 in the audience to speak, and I think we'll --

1 MS. HOLMES: Excuse me, I believe you're
2 forgetting one of the parties, the Coastal
3 Alliance on Plant Expansion.

4 CHAIRMAN KEESE: Oh, I just have a bad
5 list here. I started halfway down it. Mr.
6 Naficy.

7 MR. NAFICY: Thank you. I'm Babak
8 Naficy; I'm counsel for Coastal Alliance on Plant
9 Expansion.

10 And I want to begin my remarks by
11 expressing my surprise at your comments earlier
12 that the Committee or the CEC intends to not
13 docket its decision in order to influence, perhaps
14 dictate the manner in which judicial review of the
15 Regional Board's decision may take place. I have
16 some serious misgivings about this approach.

17 I don't know of what authority could
18 possibly support such an intention, and certainly
19 think that this raises some serious legal issues,
20 including the separation of power. There is a
21 very clear set of guidelines and rules governing
22 judicial review of decisions of the Regional
23 Board. And I don't quite understand how this body
24 can try to influence those particular set of
25 guidelines.

1 Having said that, I want to also
2 preliminarily indicate that we do support and have
3 supported the Coastal Commission's approach in
4 this case. We have briefed the issue before. I'm
5 not going to take the time now to go point-by-
6 point, as Ms. Holmes did. Suffice it to say that
7 we do agree with comments and the criticism of the
8 Coastal Commission of the PMPD, and leave it at
9 that.

10 I'm afraid that the starting point for
11 my comments is essentially going back to your
12 earlier decision not to consider what we think is
13 very significant information about the existing
14 plant.

15 From the evidence we have seen,
16 including the energy market, which we have been
17 looking at, the behavior of this plant, comments
18 made by Mr. Hickok as Mr. Ellison referred to
19 earlier, it seems like Mr. Ellison is the one
20 engaging in speculation about units 1 and 2 coming
21 back, or this plant ever operating at levels near
22 what they were in 1999 through 2001.

23 So we think that -- I'm going to borrow
24 a phrase that Duke coined earlier in these
25 proceedings in their briefs about reality checks.

1 I think we need a number of reality checks because
2 for one, first reality check is what is this
3 existing plant that the PMPD refers to?

4 The PMPD says the existing plant
5 consists of units 1 through 4. One and 2 have not
6 operated, as far as I know, at least in a year and
7 a half. So, right off the bat, the project, the
8 description of the existing plant is flawed. It
9 appears that one of the central tenets of CEQA is
10 being ignored, which is give an accurate project
11 description, including the existing baseline,

12 I think even if this Committee and this
13 body ignores this new information it's not going
14 to go away. When the issue comes up before the
15 Regional Board they're going to have to take
16 account of it. It's not late for their
17 proceedings. It's going to be subsequent in time.
18 This has been going on for a long time and by the
19 time they look at it. And I think what's
20 happening is that you would simply be passing the
21 buck to the Regional Board to engage in analysis
22 of the ramifications of what the existing plant
23 is, because your findings in this regard are
24 simply not going to be accurate and reliable for
25 their purposes.

1 So, we think that it would be
2 appropriate not to take a final decision on this
3 PMPD, and take a serious look at what is the
4 existing plant.

5 I want to point out that the
6 ramifications of the current conditions, the
7 status of this plant go beyond the issue of CEQA
8 baseline; and whether you're going to conclude, if
9 according to CEQA, this plant will have a
10 significant adverse impact on the environment.

11 As I briefly mentioned in my two minutes
12 on the motion to reopen, the decision, the
13 recommendation that dry cooling is infeasible
14 rests, in large part, on a number of assumptions
15 that are tied directly to the continued operation
16 of this plant.

17 These include site constraints. When,
18 according to the PMPD and Duke, only 20 acres of
19 the site is available, you have to ask if the
20 plant is not profitably operating why couldn't it
21 be dismantled before construction could start. We
22 raised that issue. The PMPD's response was, well,
23 you haven't taken into account the value of lost
24 revenue that would come from generating
25 electricity during construction. Well, it doesn't

1 appear that that value is very great at this
2 point.

3 Costs of moving or removing facilities,
4 or relocating them, that was another cost item
5 that was identified in the PMPD. Duke's dry
6 cooling vendor suggested that there's simply not
7 enough room in here for a dry cooled facility.
8 They expressed safety concerns about operating
9 cranes in so close to live electrical wires.

10 All of these issues really need to be
11 re-examined in light of what the existing plant is
12 really doing right now. This is nothing to do
13 with CEQA baseline. You may decide one way on the
14 CEQA baseline issue. This has nothing to do with
15 that. This has to do --

16 CHAIRMAN KEESE: I'm just going to
17 suggest that we're under a mandate that we've
18 violated here to make a decision within one year
19 of the filing, of the finding of data adequacy.
20 That's the mandate. We've violated it here by
21 taking as much time as we have to pursue many
22 issues differently.

23 I just don't -- well, would you like to
24 explain to me where your analysis fits into the
25 one-year timeframe?

1 MR. NAFICY: Well, the way I understand
2 it we're well beyond the one-year mandate. And I
3 think --

4 CHAIRMAN KEESE: We did. We did.

5 MR. NAFICY: And I think there's a
6 greater mandate to the people of the State of
7 California to protect the environment than to the
8 one-year mandate.

9 CHAIRMAN KEESE: Well, --

10 MR. NAFICY: I think that -- I mean, if
11 you have to -- you've already violated the one-
12 year mandate. And if there is a balancing of
13 mandates, I would submit to you that I don't think
14 the blind, you know, blind adherence to some what
15 I consider to be arbitrary time limit, is not the
16 one that should trump the other.

17 CHAIRMAN KEESE: We have, in fact,
18 violated it on that basis. However, the baseline
19 does at least steer us towards a prompt resolution
20 of issues. And to suggest now that at this point,
21 four years after a filing, we're going to start
22 over with a new baseline, and restart the whole
23 process, just --

24 MR. NAFICY: Well, I --

25 CHAIRMAN KEESE: -- is mind-boggling.

1 MR. NAFICY: Well, mind-boggling though
2 it may be, those are the circumstances on the
3 ground. I didn't ask Duke to, you know, I didn't
4 dictate the energy market. CAPE certainly didn't
5 have any influence on that. But what you're
6 suggesting is even though a decision hasn't been
7 rendered in this case, you want to ignore, you
8 know, the existence of a set of facts in the
9 world.

10 CHAIRMAN KEESE: I'm suggesting that
11 CEQA mandates that we use the facts as they are
12 established when the filing is made.

13 MR. NAFICY: When the Regional Board is
14 going to look at feasibility of dry cooling
15 they're going not -- they will not be able to rely
16 on the finding of infeasibility that is based on
17 this CEC's interpretation of CEQA. It's not going
18 to be defensible.

19 I have to raise it here, and that's what
20 I'm doing. But I believe that the finding of
21 infeasibility is so intertwined with assumptions
22 about the existing plant that now that those
23 assumptions have been proven false, it no longer
24 can stand on its own. It has to at least be
25 analyzed. You have to at least take another look

1 afresh at the conditions on the ground.

2 I've raised many -- I mean there's not
3 enough time for me to go through a litany of these
4 issues, but simply constructability, cost, site
5 constraints, safety. These are all issues that
6 have to be relooked at, readdressed in light of
7 the life of the plant.

8 And, you know, the PMPD can't say this
9 existing plant consists of units 1 through 4,
10 which is really, there's no substantial evidence
11 supporting that contention. Units 1 and 2,
12 according to Duke's own testimony before the CEC,
13 it's very unlikely to ever come back on board.

14 I'm going to move on unless -- I'd be
15 happy to answer more questions, but time is rather
16 limited.

17 Another reality check, something that no
18 one has mentioned, no one has talked about, is
19 whether or not the project, as proposed by Duke,
20 as considered by the Regional Board, can ever be
21 built consistent with the 316(b) regulations.

22 As you may or may not know, there's
23 currently two pending challenges to the new
24 existing plant regulations; one of them by no less
25 than six attorneys general from northeastern

1 states. We already have a decision in the
2 Riverkeeper case from the Second Circuit. Based
3 on the reasoning of that decision, two additional
4 challenges -- to challenges to the existing plant
5 regulations have been mounted.

6 There's virtually no discussion of the
7 ramifications of this challenge. I submit to you
8 that the evidence, the legal evidence is clear
9 that the regulations that authorize HEP type
10 mitigation measures are going to be struck down.
11 Because the Second Circuit has made it clear that
12 best available technology does not include HEP
13 type mitigation, reconstructing the environment
14 rather than avoiding the impact.

15 So, at a minimum I would expect the PMPD
16 would have to discuss the ramifications of this
17 legal change, essentially. The 316(b) regulations
18 that were assumed by the Regional Board, that the
19 PMPD relied on in its LORS analysis, it's just not
20 going to be around. And even if the Committee
21 differs with that opinion, they have to at least
22 take into account that these are the legal
23 evidence. So, I think there needs to be a reality
24 check on where the 316(b) regulations are going.

25 I also want to address the override

1 issue, which, again, it boggles the mind that this
2 issue has just simply not been addressed at all.
3 I've read and reread the PMPD's analysis of
4 override, and I simply don't understand how -- if
5 the PMPD's analysis of why an override is
6 appropriate in this case, why in each and every
7 case that the CEC looks at a power plant, it could
8 not or should not simply say, well, this plant
9 will generate electricity; society uses
10 electricity; therefore, any environmental impacts
11 can be subject to override.

12 This analysis proves way too much. If
13 this analysis is correct, then it swallows the
14 rule. There's no analysis of why this particular
15 plant is needed, what its contribution to the
16 energy market, whether it is genuinely needed for
17 public convenience or necessity. Not at all. The
18 only analysis is our society relies on
19 electricity; this plant generates electricity;
20 therefore, ipso facto, it's necessary for public
21 convenience. And I submit that there's not a
22 shred of analysis of actually whether this plant
23 is needed for public necessity and convenience.

24 CHAIRMAN KEESE: We'll call it nine and
25 a half minutes, leave you 30 seconds for rebuttal.

1 MR. NAFICY: Okay, thank you.

2 CHAIRMAN KEESE: Thank you. Ms. Holmes,
3 did you indicate I had another party that I
4 missed?

5 MS. HOLMES: No, just CAPE.

6 CHAIRMAN KEESE: All right. Well, why
7 don't we start on rebuttal. Mr. Ellison.

8 MR. ELLISON: Again, I'll try to be very
9 brief. With respect to the staff comments in
10 support of -- and the Coastal Commission Staff's
11 comments, I did not go item-by-item through them.
12 I can certainly do that if you wish. We have
13 provided that to you in writing.

14 I will simply mention two very quickly.
15 With respect to this idea that the PMPD somehow
16 speculates, this is the so-called spawning event
17 issue, the issue here is really quite simple. If
18 there -- I'm going to leave aside the question of
19 whether there are spawning that's in the estuary,
20 and let's assume for the moment there are, and
21 that they are in some way different than the
22 overall pattern that occurs, the issue is in that
23 short-term event will the modernized plant be
24 withdrawing more water than the existing plant.

25 Now, what the staff has recommended is

1 that you make that comparison by using the maximum
2 capacity of the new plant with the long-term
3 average historical use over a year or more of the
4 existing plant.

5 What the Committee held, and certainly
6 our position, is that if you're looking at a
7 short-term impact like that, that the apples-to-
8 apples comparison is the maximum capacity of the
9 new plant, which might be operating at that
10 moment, compared to the maximum capacity of the
11 existing plant, which also might be operating at
12 that moment. There's nothing speculative about
13 that. It's pure common sense.

14 Secondly, the issue with regard to
15 cumulative impacts is whether cumulative impact
16 analysis allows you to accumulate insignificant
17 impacts of the project in front of you that have
18 been found individually insignificant and
19 characterize them as significant simply by the
20 number of insignificant impacts, that's not the
21 law.

22 What the law is under CEQA is that
23 cumulative impacts are intended to address the
24 impacts of a project with other projects that are
25 individually insignificant, but because of the

1 accumulation of this project with other projects,
2 picture housing for example, they are cumulatively
3 significant. That's what we argued; that's what
4 the Committee found. That's what the law is.

5 With respect to CAPE, let me just say a
6 couple things about the temporary removal from
7 dispatch of the existing plant. First of all,
8 Duke has done precisely the same thing with South
9 Bay Unit 4 last year, and it is now back in
10 service.

11 Secondly, CAPE argues that the operation
12 of existing units 1 and 2 -- well, actually they
13 keep referring to the existing plant. What has
14 been temporarily withdrawn from service is only
15 units 1 and 2. Three and 4 are operating today as
16 we speak. But with respect to even units 1 and 2,
17 they argue that somehow this not only should
18 change your CEQA analysis, and we've already
19 responded to that, but that it should also -- it
20 goes fundamentally to the feasibility of dry
21 cooling.

22 There's a lot that can be said about
23 this. I'm going to just focus your attention on
24 one very simple feasibility issue among the very
25 many. Long ago I recall Rob Schultz, the City

1 Attorney for the City of Morro Bay, saying to this
2 Committee at hearings, there is no dry cooling
3 alternative at this site because the City is
4 opposed to dry cooling and the use of City
5 property is required to build this project. And
6 the City will not let Duke have site control, will
7 not let Duke have access to the site if it's a dry
8 cooled facility because they object to the visual
9 impacts of the huge dry cooling structures that
10 are involved.

11 So if there were no existing project
12 onsite you would still have an inability to build
13 this project through a lack of site control. That
14 is one of many, including the visual impacts,
15 themselves, aspects of feasibility of this project
16 that the Committee found that are independent of
17 the operation of the existing facility.

18 It is true the Committee also found a
19 number of feasibility issues that relate to the
20 presence of the existing facility onsite. But I
21 want you to understand that many of the
22 Committee's findings are unrelated to that issue.

23 And lastly I want to respond briefly to
24 the argument about the Regional Board regulations
25 in the Riverkeeper case. Because this case has

1 gone on so long the water quality regulations
2 under 316(b) have been proposed to change, post-
3 hearing. And the Regional Board is considering
4 the new regulations. And Duke has recently
5 refiled its application to respond to the new
6 regulations.

7 The new regulations explicitly endorse
8 the kind of HEP proposal that Duke is making here.
9 But that proposal was made under the former
10 regulations. And the Regional Board Staff
11 supported that proposal as being consistent with
12 316(b) and the former regulations at that time, as
13 did Duke. And when the Committee heard this
14 argument at hearings it was under the former
15 regulations.

16 So even if you speculatively assume that
17 the new regulations will be set aside, that merely
18 puts you right back to where the record was when
19 the Committee closed the record in this case.

20 That's all I have to say. Thank you.

21 CHAIRMAN KEESE: Thank you. Ms. Holmes.

22 MS. HOLMES: Thank you. I'm just going
23 to address briefly the question about short-term
24 impacts. And I'm sorry that there's been so much
25 confusion about it.

1 Staff is not recommending an apples-to-
2 apples comparison. Staff is recommending that
3 short-term impacts be evaluated in the following
4 way: First, we need to have a baseline; we need
5 to know what the historical water use is on a
6 short-term basis. We've recommended that the
7 Committee use the water use data that has been
8 provided to the Commission by the Regional Board.
9 They have monthly data for I think it's 15 or so
10 years. We are recommending that that be used as
11 the baseline for determining the short-term
12 impacts.

13 We believe it's extremely important for
14 the Committee to use real numbers and not
15 hypothetical pumping capacities that may never
16 have been utilized for the project. We believe
17 the case law supports our position that the
18 Committee must use the real conditions on the
19 ground in establishing a baseline for short-term
20 impacts.

21 Secondly, you need a future use number;
22 a number that says here's how much they might use
23 in the future. And then you do a comparison
24 between the two and see whether or not there's an
25 increase.

1 It is true that staff has used a number
2 that is at or close to the maximum pumping
3 capacity for the new facility. That's because
4 there's expert testimony in the record that says
5 that it's important -- excuse me, that it's not
6 unreasonable to assume that this project will
7 operate at close to its maximum capacity during
8 periods of peak load.

9 In fact, that's what the Committee
10 wants. The Committee has rejected staff's cooling
11 alternative because it doesn't provide enough
12 maximum peaking capacity.

13 Simply put, you can't have it both ways.
14 You can't say both the peaking capacity is really
15 important to the project and then say that staff
16 is speculating when it attributes the water use
17 associated with that peaking capacity in
18 conducting its comparison of short-term impacts.

19 And we believe that when you look at the
20 actual historical water use numbers, not the
21 pumping capacity numbers, the real numbers, and
22 you compare it to reasonable assumptions about
23 future use, you will reach a conclusion that there
24 can be short-term increases in water use, and that
25 these may occur at times when there are critical

1 biological events happening in the estuary. And
2 that is the basis of staff's recommendation.

3 Thank you.

4 CHAIRMAN KEESE: Thank you. Mr.
5 Schultz, anything else to add?

6 MR. SCHULTZ: Yes, just briefly. Robert
7 Schultz, again. The City specifically didn't get
8 involved in this baseline issue because we were
9 directed by our City Council not to, to leave that
10 up to your staff and to the Water Board. So we
11 won't be responding to that.

12 My other reply, Mr. Ellison kind of
13 stole on me, regarding the feasibility. But I'll
14 just kind of replay that. I think the record
15 adequately reflects that I did testify that the
16 City controls the land on which the outfall
17 discharge is, and that we would not grant any type
18 of lease for a hybrid cooling system.

19 And with regards to the large dry
20 cooling towers, there would be agreements that are
21 necessary for access, bridge access and access to
22 the road; and also even the fact that part of the
23 towers could encroach on City property. So
24 numerous agreements would be needed from the City,
25 and the City will not grant those because of the

1 impacts to the City from dry cooling.

2 So, simply put, the lack of site control
3 makes these alternative cooling options infeasible
4 at the site, pursuant to Public Resources Code
5 25526 and the CEQA guidelines.

6 Thank you.

7 CHAIRMAN KEESE: Thank you. Mr. Luster.
8 Coastal Commission.

9 MR. LUSTER: Thank you, Mr. Chair,
10 Commissioners. Just a few brief comments.

11 Regarding the concern about cumulative
12 impacts, CEQA does recognize that impacts may be
13 combined from a single project. Section 15355 of
14 CEQA states that cumulative impacts refers to two
15 or more individual effects, et cetera, et cetera,
16 that may result from a single project or a number
17 of separate projects. So I think the reading of
18 cumulative impacts would allow both entrainment
19 and impingement to be combined in this case.

20 Also regarding the issue of
21 infeasibility due to site control for dry cooling
22 because of the City's opposition, we commented
23 previously on this issue. The Coastal Act
24 provides that the applicant in this situation may
25 appeal the City's denial to the Coastal

1 Commission. So this concern about site control is
2 not a valid reason to determine this is an issue
3 of infeasibility.

4 Thank you.

5 CHAIRMAN KEESE: Thank you. Mr. Naficy.
6 Briefly.

7 MR. NAFICY: Very briefly. One issue
8 that I'm sorry but I simply neglected to bring up
9 is one of the reality checks that is very near and
10 dear to CAPE's heart, is that we simply don't
11 understand the basis for the PMPD's suggestion
12 that without Duke's \$12 million there won't be any
13 moneys available to do sediment control projects.

14 The acquisition of the Manuel Ranch
15 conservation easement alone within the last year
16 shows that moneys are available. And the CEC
17 simply cannot reach a legal conclusion that the
18 Regional Board will not fulfill its legal mandate
19 to fund TMDLs for sediment control.

20 This issue of feasibility, I agree with
21 Mr. Ellison that there are a number of different
22 reasons cited by the PMPD for its conclusion that
23 dry cooling is not feasible. However, it's
24 important for the basis for that conclusion to be
25 very clearly outlined for the public and for the

1 Regional Board.

2 Because, for example, the reason cited
3 by Mr. Ellison and Mr. Schultz regarding the
4 City's site control issues, these kind of
5 provincial concerns of a city cannot make a
6 project infeasible for the purposes of the federal
7 Clean Water Act.

8 I would submit that it would not make
9 them infeasible for Coastal Commission purposes,
10 either. Even if arguably they could for CEQA
11 purposes. So it's very important for this
12 Committee to be very clear about the basis for its
13 findings of infeasibility, because some of them
14 may be useful for the Regional Board in their role
15 as implementors of the federal Clean Water Act.
16 And others are simply irrelevant.

17 What the City, you know, maybe Duke will
18 never be able to build this project because the
19 City will not let them build dry cooling. But
20 that, I submit, does not make the project
21 infeasible for purposes of the Clean Water Act.

22 Thank you.

23 CHAIRMAN KEESE: Thank you. We are now
24 going to hear from a number of members of the
25 public who have indicated an interest in speaking.

1 I also have four people on the phone interested in
2 speaking. And I trust Mr. Boyd is still with us,
3 and may be interested in speaking later on, also.

4 Mr. White, Sierra Club.

5 MR. WHITE: Thank you, Mr. Chairman.

6 CHAIRMAN KEESE: I'm not going to put a
7 time limit unless you violate --

8 MR. WHITE: I'll try to be brief --

9 CHAIRMAN KEESE: -- my informal time
10 limit.

11 MR. WHITE: -- and not abuse the
12 privilege of being here with you today.

13 Thank you, Mr. Chairman. I'm here today
14 on behalf of the Sierra Club at the request of the
15 Santa Lucia Chapter of the Club, which has been an
16 active member of the coalition opposing the
17 project.

18 I appreciate the Chairman's earlier
19 remarks about the pressures on this Commission
20 with regard to approval of projects in a timely
21 fashion, and sympathize with the situation you
22 find yourself in, because it isn't politically
23 easy to slow or reject a power plant proposal,
24 even though at the moment I think we're faced with
25 a situation where a great deal has changed since

1 this project began, both in terms of the market
2 and in terms of the economy that require, I think,
3 some deliberation on those changes.

4 First of all, there just simply isn't a
5 crying need for more power to be injected around
6 the midway transmission grid. And there's good
7 reasons not to try. The underlying assumptions
8 about gas prices, I think, are out of date. This
9 project, the existing project simply won't run, in
10 my opinion, as much as was projected, given that
11 prices are high and likely to stay high.

12 And I think that need of a existing
13 facility are simply out of date. And that you
14 should really revisit the EIR before approving the
15 facility.

16 The primary function and the continued
17 operation of the existing facility would be to
18 provide backup capacity to the grid, not energy as
19 the EIR assumed. It might be worthwhile to ask
20 the ISO to run the existing facility through their
21 production cost model, and I think you'd find that
22 it's not going to show up as a very cost effective
23 resource.

24 Another thing that's happened since we
25 started is that the passage and implementation of

1 the renewable portfolio standard has reduced the
2 need for this particular facility, but that
3 implementation of the RPS and implications thereof
4 are not considered to our knowledge in the EIR.

5 Tehachapi wind, which we're hopeful of
6 having a significant expansion occur, further
7 reduces the need for Morro Bay. RPS
8 implementation, in our view, is only possible if
9 there is a significant amount of energy provided
10 from Tehachapi in the timeframe that's being spoke
11 of.

12 The Tehachapi collaborative study group
13 is considering transmission options to allow
14 energy from Tehachapi to be sold into the PG&E
15 territory. The power would enter the grid
16 backbone more or less at the same point as power
17 from Morro Bay.

18 And in that study group we understand
19 PG&E's claim, that even after the upgrade of Path
20 15, it would be inadequate to move additional
21 power north from Tehachapi some of the time. If
22 this is true, Path 15 may not be able to handle
23 the increased power from Morro Bay, either.

24 So we would at least suggest we may not
25 have all the accurate information, but these

1 transmission assumptions made in the EIR need to
2 be reexamined.

3 And then finally, no investor-owned
4 utility has identified Morro Bay as needed in
5 their recently filed long-term procurement plans.
6 So this is not a situation where this particular
7 facility at this particular location is needed by
8 the statewide grid. There are certainly local
9 power requirements at Morro Bay, but probably not
10 of the size that are needed -- would be needed for
11 this large a facility.

12 So, as painful as it might be, given all
13 the time and money that people have spent, and all
14 the effort that this Commission and the proponents
15 have made, we think the project deserves a further
16 look in light of new events and new developments,
17 and in light of continuing controversies on the
18 environmental impacts.

19 Thank you.

20 CHAIRMAN KEESE: Thank you, Mr. White.
21 Mr. McKinsey.

22 MR. MCKINSEY: Thank you, Chairman
23 Keese. My name is John McKinsey and I certainly
24 know a few of you, but I don't know all of you.
25 Not all of you have heard me speak before.

1 I represent today West Coast Power which
2 is the applicant -- actually it's El Segundo Power
3 II is the applicant's name -- in the El Segundo
4 Power Plant case. And I'm not going to repeat
5 everything that we've said in our brief for two
6 reasons.

7 One, I'm assuming you've all read it.
8 And I think it speaks for itself. Also, the lack
9 of discussion of that perhaps tells me that at
10 least the Committee has not been made concerned by
11 our warnings and our explanations about the ways
12 in which the Morro Bay amendments frankly defy the
13 law.

14 And we understand Duke's position quite
15 well, because they're in a situation where they've
16 got the original third, I wouldn't say original,
17 but the third revised PMPD and the Morro Bay
18 amendments, which though procedurally are vastly
19 different, reach the exact same result in
20 substance. And thus, from the perspective of what
21 type of burdens are going to be placed upon the
22 project, they're equal.

23 And should it turn out, indeed, that
24 they're going to have problems with the proposed
25 changes, then indeed they'll be able to simply

1 come back and say we think you'd have a procedural
2 problem in your decision, we would like you to
3 rephrase it.

4 Obviously where we're going to run into
5 this matter very significantly is in our project
6 in El Segundo. But I'm not here dealing with that
7 project today. What I'm really trying to do is to
8 really say to you very carefully exactly why the
9 Morro Bay amendments that you're proposing to take
10 are not only a violation of the law, but they're
11 completely unnecessary.

12 And they're unnecessary because the
13 third revised decision did an excellent job of
14 one, really putting off the decision. They said
15 very carefully well, it may be true that the
16 Coastal Commission is correct, that they get to
17 file 30413(d) reports in AFC proceedings. But it
18 may also be wrong. So let's decide the case going
19 both ways just in case.

20 In other words, without the Morro Bay
21 amendments you've got a much more balanced
22 decision that supports either conclusion on the
23 law. But, for some reason, the Committee has seen
24 to rewrite that, and actually put themselves in a
25 much more, very specific, and frankly wrong

1 position regarding the law and the Coastal
2 Commission's role in that.

3 The way in which you got there, I think,
4 if I was to summarize it, is you've managed to put
5 the cart before the horse twice. First, and I can
6 almost repeating what you said at the beginning
7 Chairman, you said we concluded that the Coastal
8 Commission's timely recommendations made under
9 30513(d) dada-dada-dada. And that is really the
10 nut of the problem, is that the comments that the
11 Coastal Commission made were not made pursuant to
12 30413(d). And you really don't have to go any
13 farther than that right there.

14 Secondly, even if somehow you were
15 trying to conclude they were, they definitely were
16 not timely. The two conclusions that you get from
17 all this is that first, since there is a 30413(d)
18 report we thus have to then give this extra
19 respect to the Coastal Commission's comments, and
20 it takes you into this still very contentious
21 issue about what it takes to override a Coastal
22 Commission position.

23 The reason that you're in that situation
24 is because what the Morro Bay amendments purport
25 to do is to go vastly beyond what could ever have

1 occurred even if there had been an NOI in this
2 proceeding. Because if there had been an NOI in
3 this proceeding, then section 30413(d), which is
4 very clear, would allow the Coastal Commission to
5 issue its 30413(d) report at a very early stage in
6 the NOI proceeding.

7 At that point in the NOI proceeding all
8 that would have been present would have been a
9 submittal by the applicant that said here is our
10 preferred site, here are alternative sites, here's
11 the pros and cons of these sites. By the way,
12 we're going to burn natural gas. And we think on
13 our preferred site we're going to put it over
14 here. And we're going to be a combined cycle
15 facility. And maybe it would mention the type of
16 cooling.

17 It definitely wouldn't have the
18 engineering detail, all the specific design
19 characteristics that an AFC has.

20 And so even if there had been an NOI in
21 this proceeding, and thus, even if you really did
22 have a 30413(d) report, there's no way that the
23 Coastal Commission could be trying to make the
24 incredibly specific detailed comments and
25 recommendations that are binding the hands of you,

1 as a Commission, and leading to this conundrum you
2 have in which you've got the Coastal Commission
3 saying you can't override us, and you've got
4 parties agreeing and disagreeing with them.

5 The truth of the matter is that there
6 was never a 30413(d) report. But even if there
7 was, the Morro Bay amendments are actually going
8 to grossly distort and go farther beyond whatever
9 could have existed in terms of the role of the
10 Coastal Commission.

11 The Legislature, very specifically, has
12 exempted, at this point in time, all natural gas
13 power plants. But even back two years after the
14 Coastal Commission was created they accepted a
15 plant such as Morro Bay and such as El Segundo
16 repowering of an existing facility.

17 And anything to the aside, there is
18 nothing vague or ambiguous in section 30413(d).
19 There is nothing vague or ambiguous in 25523(b).
20 There is nothing vague or ambiguous between them
21 or in the conflict of them. They are in harmony.
22 And if the statute is in harmony and it says very
23 clearly that the Coastal Commission can issue a
24 report pursuant to section 30413(d) and that it
25 has to be an analysis of an NOI and it has to be

1 submitted prior to an event in the NOI proceeding,
2 the issuance of the preliminary report in an NOI,
3 then there is no way that you could say that the
4 law can be interpreted or even suggest that
5 somehow the Coastal Commission ought to be able to
6 do that very same document, binding the hands of
7 the Energy Commission in the middle or perhaps on
8 the eve, or even perhaps after, or whatever
9 arbitrary date you wanted to select in an AFC
10 proceeding.

11 And by doing that, and the real reason
12 that I'm trying to get here today, because we will
13 deal with this issue again, regardless of the
14 conclusion you take today, but in doing this path,
15 in attempting to try to give the Coastal
16 Commission the ability to submit 30413(d) reports
17 in AFC proceedings, I don't think all the
18 Commissioners really understand what you're going
19 to be doing.

20 You're going to be giving the Coastal
21 Commission the ability to make every single little
22 decision about every detail of every power plant
23 in the coastal zone. And that, I'm not being
24 overly zestful when I say, is really a transfer of
25 the permitting decision authority from the Energy

1 Commission to the Coastal Commission. And that's
2 what I'm trying to warn you of, and hopefully
3 convince you that the Morro Bay amendments are
4 completely unnecessary, violative of the law.

5 And what you wrote in the third revised
6 decision is a solid decision, and that is what you
7 should be approving today.

8 CHAIRMAN KEESE: Thank you, Mr.
9 McKinsey, and I thank you for your continued
10 participation in this case, and informing the
11 Committee. I have suggested to our General
12 Counsel and our Executive Director that they read
13 your filings in conjunction with ongoing
14 negotiations that we're going to be starting with
15 the Coastal Commission.

16 Mr. Luster is here. I'm sure he has
17 seen your filing. You know, I personally agree
18 with the point that the role of the Coastal
19 Commission is early in the process, and it was in
20 the NOI process.

21 We have attempted in two ways to deal
22 with your issue. The first decision was declared
23 precedential. We are not proposing to this
24 Commission we adopt this one as precedential.

25 We have also referred to the timely,

1 without specifying exactly what we mean, and
2 timely filing in compliance with the appropriate
3 code section that instructs the Coastal Commission
4 how they should participate at that point in our
5 process. We are leaving those details up to our
6 staff to work with the Coastal Commission on.

7 Now, we will, as a Committee I happen to
8 be on, and as a Commission, have to deal with El
9 Segundo. We have separated the two cases, and
10 we're going to try to deal with it as best we can.

11 We recognize your viewpoint. We also
12 recognize that the law from the initial start had
13 reserved a special place for the Coastal
14 Commission and BCDC, I should -- Bay Conservation
15 and Development Commission. And we hope that we
16 have balanced it here.

17 We do not believe -- the Committee did
18 not believe that it had to arrive at the
19 conclusion on this issue to settle the Morro Bay
20 case. And therefore the Committee attempted not
21 to, and to decide on legal grounds on which we
22 could deal only with the Morro Bay case.

23 MR. MCKINSEY: Could I -- I'd respond
24 that --

25 CHAIRMAN KEESE: Sure.

1 MR. McKINSEY: -- making the case for
2 the third revised decision and not the Morro Bay
3 amendments, because the Morro Bay amendments are
4 attempting to decide the decision.

5 Only in the case of Morro Bay --

6 CHAIRMAN KEESE: Okay, well, our rules
7 here are if we declare it precedential; we've
8 declared as a Commission we want it to be
9 precedential. We're not declaring it
10 precedential. So this is a Morro Bay case we're
11 dealing with.

12 MR. McKINSEY: I would just say that
13 once again, though, if you really want to avoid
14 trying to say this is what the law is and be
15 wrong, if you selected the third revised --

16 CHAIRMAN KEESE: And I --

17 MR. McKINSEY: -- decision you would be
18 avoiding that entirely.

19 CHAIRMAN KEESE: -- I appreciate the
20 eloquence with which you've stated that orally and
21 in writing. I think you've submitted excellent
22 documents to us that can be used by our staff.

23 MR. McKINSEY: Thank you.

24 CHAIRMAN KEESE: Thank you. Thank you
25 again for your continued participation in this

1 case.

2 Mr. Nelson. And I'll let you do -- I
3 have your name for yourself and I have that you're
4 going to summarize what your wife wanted to say,
5 also. So why don't you incorporate it into one.

6 MR. NELSON: Thank you. I appreciate
7 that. My wife worked really hard on these
8 comments.

9 CHAIRMAN KEESE: Okay.

10 MR. NELSON: I'll just summarize them,
11 though, because she sent them to you, too.

12 Putting a square peg in a round hole,
13 this is what Duke is trying to do with the
14 application to expand Morro Bay Power Plant.

15 Again, I'll just paraphrase here -- Duke
16 tries to blame on others, such as CAPE, the reason
17 this application process has taken so long, almost
18 five years. It is because the new power plant is
19 the wrong thing to do in Morro Bay.

20 The reasons are many, but to name just a
21 few, increased health risk due to much higher
22 levels of small, more hazardous particulate
23 matter; inefficient transmission of energy along
24 Path 15; and most importantly, the use of a 50-
25 year-old once-through cooling technology causing

1 devastation.

2 And another point she'd really like to
3 make is what is not being factored into the
4 equation is the cost of once-through cooling on
5 the estuary and the marine life. No attempt is
6 being made to look at the big picture such as how
7 once-through cooling systems impact fisheries.
8 And what the cumulative effect of having three
9 major power plants, Diablo, Morro Bay and Moss
10 Landing, using once-through cooling within 150
11 miles of each other does to the fish population
12 and our industry.

13 I'll just leave it kind of at that for
14 my wife's comments. And now she really believes
15 this, and you know, when you look at the fact that
16 you're drawing more than three billion gallons a
17 day of water and killing just unbelievable amounts
18 of stuff, those comments really should be taken to
19 heart.

20 My comments, again, would be focused
21 toward the hard job that you people have to do up
22 there. I know that many of you sit on other
23 committees that are looking at renewable energy in
24 California and the southwest, which, you know, I
25 back you one-thousand percent.

1 But my real objection to this power
2 plant is you're being asked to put the largest new
3 power plant on the smallest estuary in California.
4 Not in the whole premise of this AFC is based on
5 the fact that in 50 years this plant has done no
6 damage.

7 Well, from the beginning of this thing I
8 have said, and the evidence is there, that the
9 Water Board, in all of its years of the Clean
10 Water Act, has never watched for any cumulative
11 impacts on this power plant. So, when we opened
12 this case, it all of a sudden was, well, there is
13 no proof that there has been any, so we're going
14 to say no there hasn't been any. And to me, that
15 is the biggest flaw in this whole case.

16 Excusing the Water Board without even
17 saying a word about not having any 316(b) results
18 or studies on my estuary.

19 And to continue to draw from the
20 narrowest channel of an estuary, just in a
21 citizen's point of view, is just unconscionable.
22 You're talking about Path 15, I mean it's already
23 bogging down. We had a wind farm at Vandenburg
24 that was denied a permit for a wind energy because
25 of the congestion on this line, which has been

1 resolved somehow. And now you're talking about
2 Tehachapi feeding into Path 15. Why put 1200, why
3 not 1000?

4 I mean I live in Morro Bay. This
5 pollution is coming on my house. These 150-foot
6 smoke stacks, which everybody thinks is a good
7 thing, is depositing this extra particulate matter
8 from a plant that's supposedly going to run a
9 whole lot, onto my house. So I'm worried about
10 this stuff.

11 And I know that you're confronted with
12 all this stuff, but fossil fuel has to be a thing
13 of the past. You know, global warming is a true
14 thing. Like I say, I know you serve on other
15 panels that deal with this. And to continue to
16 allow this to happen is just not right.

17 You talk about delays in the process.
18 Well, how many other permits does Duke have on the
19 table that they haven't even completed the power
20 plants. They've stopped production because
21 economic times doesn't allow them to finish
22 Avenal, which I might add came up at a workshop as
23 an alternative site. And they ran out and got a
24 permit to build there. And we don't have a power
25 plant there. That would, you know, supplement

1 Morro Bay nicely. But they haven't built that
2 plant, but they have the license.

3 To me, all that's happening here is the
4 state's being played. Duke is buying licenses,
5 putting them on property. It's just like if I own
6 property and I got an R1 zoned to an R4. Well, I
7 can sell that piece of property for a lot more.
8 But, you're not going to have your four units.
9 I'm not getting my power plant by you giving them
10 a license and not having them build. Avenal being
11 the one that comes to mind. But I know there's
12 other in the southwest that they've done the same
13 thing to.

14 So, really consider what you're doing
15 here. The largest power plant, fossil fuel, on
16 the smallest estuary in California. One of the
17 last that can be saved. Granted there's a lot of
18 problems with it, but people like me are working
19 on these problems. And they have to be solved one
20 at a time. And this is one of many that's
21 impacting this estuary.

22 And if you let it go for another 50
23 years it may not have another 50 years.

24 Thank you.

25 CHAIRMAN KEESE: Thank you, Mr. Nelson.

1 Mr. Jack McCurdy.

2 MR. MCCURDY: I'm Jack McCurdy, Morro
3 Bay. Thank you. Good afternoon, Commissioners.

4 On every count the Committee has not
5 been faithful to the record of this proceeding.
6 And consequently this proposed decision, I
7 believe, is a travesty.

8 On every count the Committee has been
9 misled by Duke and has blindly followed its
10 contentions that were not supported in the record.

11 Number one, on feasibility the Committee
12 has found that the new plant would require dry
13 cooling units that would be too large for the
14 site. Only by basing it on ambient temperatures
15 that are inappropriate, completely inappropriate
16 for Morro Bay. This is a fatal flaw.

17 On disproportionate costs the Committee
18 concurred with Duke's dry cooling cost estimates
19 that are grossly exaggerated. In large part
20 because of projected costs that are based on the
21 assumption of 110 million of the total of 200
22 million estimated costs of dry cooling, would have
23 to be spent on moving the facilities to allow a
24 fully operational plant to remain viable as a
25 revenue stream for Duke, even though as Randy

1 Hickok, Managing Director of California Operations
2 for Duke Energy North America, told an aging
3 plants hearing in March, that, quote, "I am likely
4 to shut that plant down hard" to save money. End
5 quote after "hard".

6 Number three, the Committee has
7 concluded that HEP will mitigate the killing of at
8 least 16 percent of the fish and crab larvae in
9 the Morro Bay National Estuary. Despite the fact
10 that the staff, Coastal Commission, Fish and Game,
11 and qualified biologists have unanimously found
12 that HEP is not a scientifically valid mitigation
13 and contains six restoration projects that have
14 not even been identified, much less evaluated.

15 If the Energy Commission approves this
16 decision it will be doing a great disservice to
17 the public and to the environment.

18 Thank you.

19 CHAIRMAN KEESE: Thank you. I have a
20 number of people listed on the phone. Mr. Bill
21 Brand. Mr. Brand, are you still on the phone?

22 MR. BRAND: Hello, hello. Hello?

23 CHAIRMAN KEESE: Yes, Mr. Brand?

24 MR. BRAND: Yeah, I'm from Redondo
25 Beach. No connection to Morro Bay. However, I do

1 drive by El Segundo and Scattergood and our EAS
2 plant down here every day. And I won't be long or
3 as eloquent as Mr. McKinsey, however, I do agree
4 with Mr. McCurdy and Mr. Nelson in their comments.

5 And I would just like to impress upon
6 the Commission that what they're doing now is
7 going to set precedent in many of these other
8 once-through cooling plants that exist on the
9 coast. As a citizens I feel like the Coastal
10 Commission should be making the decisions for the
11 coastal zone; and should be allowed to basically
12 have the permitting powers, along with the
13 California Energy Commission.

14 However, as a citizen I do feel that
15 these once-through cooling plants, as Mr. Nelson's
16 wife pointed out, they've got Morro Bay, Moss
17 Landing and Diablo doing this very closely. Even
18 closer is AES in Redondo Beach, El Segundo and the
19 Scattergood plant.

20 So I just want to impress upon the
21 Commission that those of us who, you know, AES
22 isn't even up for licensing, but they've made
23 suggestions that they will be in the future. The
24 decisions the Commission are making now are being
25 watched very closely by citizens not just in that

1 area, but as well as in areas much more densely
2 populated that see this as a bygone technology
3 from a bygone era. And that these once-through
4 cooling plants located in these coastal zones just
5 don't fit anymore with the environmental concerns
6 that the citizens have now.

7 And that's all I had to say. Thank you
8 for your time.

9 CHAIRMAN KEESE: Thank you, appreciate
10 that. Ms. Shoosh Crotzer of Morro Bay.

11 MS. CROTZER: -- can hear me --

12 CHAIRMAN KEESE: Yes, we can.

13 MS. CROTZER: Oh, okay. I'm a resident
14 of Morro Bay, and thank you for giving me this
15 opportunity to speak.

16 At present you've been told that the
17 plant is really hardly ever operating with only
18 two units -- with the two units closed and two
19 others just on standby.

20 I think if anybody in Morro Bay was
21 asked whether they would want the present plant
22 with its four stacks -- with its stacks running as
23 they are, to be changed with a revised four stacks
24 running 24 hours a day, by what Duke is proposing,
25 there'd be an overwhelming no within this

1 community.

2 We were told by our City that if
3 government agencies involved in the review of this
4 project were told that there were some negative
5 impacts on our environment, on our air, our water,
6 and our just general environment, that the project
7 would not be supported. And we, as residents,
8 feel strongly let down by those whom we trusted to
9 protect us.

10 Most of the agencies have pointed out
11 all these negative impacts. And please do not
12 violate our trust. The long-term residents for
13 Morro Bay or the lesser costs for Duke, which is
14 enormous, world-class energy corporation, at the
15 cost of my grandchildren's breathing is just not
16 acceptable.

17 Semantics and mitigation do not change
18 reality. What we, as residents, we know about
19 what's going on in this plant. You're not here.
20 You're looking at paper. You're discussing terms
21 that are just numbers that you toss out. Where we
22 breathe every day the results of your decisions.

23 We really feel that we're going to be
24 sacrificed, our health is going to be sacrificed
25 for the benefit of the corporate dollar. And

1 there are other states examining these issues
2 besides ours. Organizations like CAPE have
3 absolutely no financial benefit from doing the
4 work they've done diligently for years, examining
5 this project. And they are just concerned about
6 the health of the environment. And certainly that
7 cannot be said of Duke and many of the others
8 involved in reviewing this project.

9 And I'm just hoping that you will
10 consider the generations to come, and children
11 like my grandchildren who have asthma and who
12 cannot breathe the air and will not be able to
13 come and visit us when four stacks are running.
14 And I hope you will not let us down.

15 Thank you.

16 CHAIRMAN KEESE: Thank you, Ms. Crotzer.
17 And I would say while we have not discussed air
18 issues really at all during this proceeding, the
19 Committee was fully aware of the implications of a
20 power plant. And the Morro Bay Power Plant will
21 be the cleanest power plant in California when
22 built.

23 MS. CROTZER: May I say something?

24 CHAIRMAN KEESE: Yes, you may.

25 MS. CROTZER: You're stating that it

1 will be the cleanest one built. However, since at
2 present only one or two of the stacks -- of the
3 units are operating on a standby basis, and the
4 others are no longer even being used, the four
5 that they are proposing which will be run on a 24-
6 hour basis absolutely will cause more problems in
7 our environment than what is presently existing.

8 So even though it may be a cleaner
9 plant, based on what is presently going on where I
10 live, and when I look out my window and what I see
11 and what I'm breathing, it will be worse.

12 And no matter how many ways you can
13 manipulate the figures on paper, the reality is,
14 and everybody knows this, it's just a way of how
15 can we say it better, the reality is this will not
16 be good for the people of Morro Bay who breathe
17 this air and who fish, fish swim in our estuary.
18 And that's just a fact.

19 And we're all just disappointed the way
20 it's being talked around, especially by Duke. And
21 those whom we're trusting to listen to our health
22 concerns, and we don't feel that they're being
23 listened to. We hope you rise to the occasion.

24 Thank you.

25 CHAIRMAN KEESE: Is Colby Crotzer at the

1 same place you're at?

2 MS. CROTZER: No he's not. But he
3 called me and he said he was on the phone for
4 almost two hours, and he could no longer wait. He
5 had another meeting he had to go to.

6 CHAIRMAN KEESE: Thank you. You did a
7 good job.

8 MS. CROTZER: Thank you.

9 CHAIRMAN KEESE: Ms. Tarrin Collins.

10 MS. COLLINS: Hello?

11 CHAIRMAN KEESE: Yes, Ms. Collins,
12 you're on.

13 MS. COLLINS: Thank you, Mr. Chair and
14 Commissioners. I'm the Chair of Sierra Club's
15 Great Coastal Places Campaign, and also the Chair
16 of the Santa Lucia Chapter where the Duke Energy
17 Power plant is located.

18 First, I want to comment on one of the
19 callers who pointed out that people up and down
20 the coast are concerned about this once-through
21 cooling. And as the Chair of the Great Coastal
22 Places Campaign I work with citizens up and down
23 the coast. And I can assure you this is a huge
24 concern.

25 And I also want to support the comments

1 made by John White on behalf of the Santa Lucia
2 Chapter of the Sierra Club. The Santa Lucia
3 Chapter also supports the California Coastal
4 Commission's comments regarding procedures and the
5 role of the Coastal Commission. Especially
6 regarding override. We agree that the CEC
7 Committee rejected some of the Coastal
8 Commission's provisions in a manner not allowed by
9 law.

10 And as an attorney, myself, I take
11 exception to the remarks made by the Morro Bay
12 City Attorney about the Coastal Commission. These
13 remarks are unbecoming an attorney and a citation
14 of law here has no force, no legal force. It is
15 improper to cite case law unless it is cited as
16 legal precedent. Quoting derogatory comments
17 unrelated to this case simply lowers our
18 profession to a new low. And I ask that you
19 disregard those comments and remarks.

20 The Sierra Club also joins the
21 California Coastal Commission, your CEC Staff,
22 Fish and Game and Marine Fisheries, and CAPE and
23 support requiring dry cooling of the plant. This
24 is a technology that would not use estuary water
25 and would not kill fish.

1 We all agree that scientific evidence
2 shows that habitat restoration is not reliable nor
3 effective. If you want to go forward today then I
4 urge -- I ask you strongly to require air cooling
5 for this plant.

6 And I again thank you for the
7 opportunity to speak.

8 CHAIRMAN KEESE: Thank you, Ms. Collins.
9 Mr. Robert Sarvey. Welcome back, Bob.

10 MR. SARVEY: Hello, Chairman Keese,
11 Commissioners.

12 I just am a little disappointed in the
13 outcome of the cooling options here. I believe
14 that the baseline that should be considered is the
15 baseline without the existing plant. And I
16 believe that dry cooling is really the best option
17 here, and I don't understand why the Coastal
18 Commission can be overrode and the City of Morro
19 Bay is being listened to in terms of -- I think
20 eminent domain could be used on the City of Morro
21 Bay. Perhaps I don't understand the law, itself.

22 But I am very disappointed in the City
23 of Morro Bay. I vacation at Cayucos every year,
24 and would really like to see the old plant torn
25 down and not a new plant built.

1 I do appreciate the time that the
2 Committee and the Commission has spent on this
3 project, but I do think dry cooling is the favored
4 option that should be used.

5 Thank you.

6 CHAIRMAN KEESE: Thank you. Is there
7 anyone else in the audience who'd care to speak to
8 this issue?

9 We have nobody else on the phone, do we?

10 You have heard the witnesses, fellow
11 Commissioners, and you've heard the rebuttals;
12 you've heard from the public. I have not heard
13 anything today which was not broached to the
14 Committee earlier in our many events, and in the
15 filings that have come before us.

16 At this time --

17 COMMISSIONER BOYD: Chairman Keese.

18 CHAIRMAN KEESE: We're closed.

19 COMMISSIONER BOYD: This is Commissioner
20 Boyd.

21 CHAIRMAN KEESE: I'm sorry, Commissioner
22 Boyd, --

23 (Laughter.)

24 CHAIRMAN KEESE: -- you're certainly
25 there. I would entertain at this time a motion to

1 adopt the report of the Committee with the
2 Committee-proposed amendments, and with the
3 Chairman's errata that has been distributed and
4 discussed today.

5 COMMISSIONER BOYD: I would like to make
6 a couple of comments.

7 CHAIRMAN KEESE: Thank you.

8 COMMISSIONER BOYD: Just since I've been
9 not present in the room people may not be aware
10 that I have read all the submissions, including
11 Duke's. I have hard copies of everything, and
12 have spent quite a bit of time studying all of
13 those issues.

14 As you and I discussed earlier today,
15 I'm aware of the Chairman's errata and totally
16 supportive of that.

17 This has been a very difficult case, as
18 one can surmise from today's hearing, and from the
19 length of time that has taken place to deal with
20 all these issues. One can spend a lot of time
21 talking about our responsibility to protect the
22 environment and meet the energy needs of the
23 state. Those certainly have all entered into what
24 the Committee, consisting of you and I, have dealt
25 with for quite a number of years now.

1 And I do think that the Siting
2 Committee's amended third revised Presiding
3 Member's Proposed Decision is the appropriate
4 route to follow, if not the only route to follow
5 at this time. And so I would make a motion to
6 approve these findings and this issue.

7 CHAIRMAN KEESE: Thank you, we have a
8 motion. Do we have a second?

9 COMMISSIONER GEESMAN: I'll second.

10 CHAIRMAN KEESE: Second, Commissioner
11 Geesman.

12 COMMISSIONER GEESMAN: I have a couple
13 questions for Mr. Ellison.

14 CHAIRMAN KEESE: Commissioner Geesman.

15 COMMISSIONER GEESMAN: Does Duke
16 currently have a contract for the output of this
17 plant?

18 MR. ELLISON: Let me refer that question
19 to Randy Hickok, Vice President of Duke, who's
20 sitting to my immediate right.

21 MR. HICKOK: We do not currently have a
22 contract for the production of the plant.

23 COMMISSIONER GEESMAN: Would it be
24 reasonable for me to assume that you're not likely
25 to proceed to construction until you've made some

1 kind of arrangement for the output of the plant?

2 MR. HICKOK: Yeah, I think that's
3 reasonable, yes.

4 COMMISSIONER GEESMAN: Has there been
5 any point in the last two or three years when you
6 would have proceeded to construction without a
7 contract for the output of the plant?

8 MR. HICKOK: Three years ago --

9 COMMISSIONER GEESMAN: About the time
10 Enron went bankrupt.

11 MR. HICKOK: -- we may have. About the
12 time they went bankrupt is about the time
13 everything, you know, the market dynamics turned.
14 So from that point forward, I think, the only
15 model that a merchant power plant developer would
16 be comfortable with is building a plant for which
17 the power was already contractually committed.

18 COMMISSIONER GEESMAN: I'm just trying
19 to get a handle on the actual ramifications of the
20 unfortunate delay in this proceeding. And I do
21 take some exception, Mr. Ellison, to your
22 characterization earlier that there are no winners
23 here. It seems to me that if we adopt
24 Commissioner Boyd's motion today, Duke is a
25 winner. If Duke is successful in going forward

1 with the construction of the project, which I
2 sincerely hope they will be, then the City will be
3 a winner, the environment will be a winner, and I
4 think the people of California will be a winner.

5 So, I think we need to keep that in
6 sight.

7 MR. ELLISON: I certainly didn't mean to
8 imply that with the assumptions that you just made
9 that those statements are not true. I
10 wholeheartedly agree with them. I think the
11 concern is that Duke cannot proceed to begin its
12 negotiations for a contract until it has the
13 Energy Commission permit, as well as the Regional
14 Board permit. And given the changes that are
15 going on in the marketplace, we'll see.

16 CHAIRMAN KEESE: Thank you. Any other
17 comments from the Commissioners?

18 We have a motion and second.

19 MR. FAY: Mr. Chairman, as a point of
20 clarification I'd just like it to be very clear
21 for the record my impression, and correct me if
22 I'm wrong, is that Commissioner Boyd has moved the
23 third revised PMPD, as modified by the amendments,
24 and modified further by the Chairman's errata.
25 I'd just like that to be confirmed.

1 CHAIRMAN KEESE: That's --

2 COMMISSIONER BOYD: Correct, Mr. Fay.

3 CHAIRMAN KEESE: And is that correct on
4 the second?

5 COMMISSIONER GEESMAN: And that's what I
6 seconded.

7 CHAIRMAN KEESE: And that was what was
8 seconded. Thank you.

9 All in favor?

10 (Ayes.)

11 CHAIRMAN KEESE: Adopted five to
12 nothing. Thank you, everyone.

13 As I mentioned, members, before I closed
14 my opening remarks, we are recommending that this
15 be adopted and not docketed; and without objection
16 that's the way we will handle it.

17 Thank you.

18 We are -- hold the record open one
19 moment.

20 (Pause.)

21 CHAIRMAN KEESE: We are adjourned, thank
22 you.

23 (Whereupon, at 4:02 p.m., the business
24 meeting was adjourned.)

25

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I, PETER PETTY, an Electronic Reporter,
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